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Making a MOUNTAIN Out of a MOGUL:

*Jeremy Bloom v. NCAA and Unjustified Denial of
Compensation Under NCAA Amateurism Rules*

-By Gordon E. Gouveia*

In 2001, Jeremy Bloom postponed one childhood dream to pursue another when he deferred enrolling at the University of Colorado at Boulder (hereinafter "CU") on a football scholarship in order to train and compete in the 2002 Winter Olympics.¹ In 2002, before arriving at CU, Jeremy became the World Cup champion in freestyle moguls skiing and the youngest person ever to be ranked number one in freestyle moguls.² Before enrolling at CU, Bloom acquired endorsement contracts with Dynastar, Oakley, and Under Armour, for which he was paid to use the manufacturers' equipment, goggles, and apparel.³ The endorsements enable Bloom to earn a comfortable living and to support the costs associated with a professional skiing career.⁴

As a freshman at CU, Jeremy Bloom, a wide receiver and punt-return specialist, had a 94-yard reception which was the longest in school history and an 80-yard punt return against Oklahoma in the 2002 Big 12 championship game.⁵ Bloom studies Communications and hopes to pursue a career as a television and movie performer.⁶ He also has a modeling contract with clothing designer Tommy Hilfiger and acquired on-camera acting positions with Nickelodeon and Music Television (MTV), which provide valuable opportunities to realize his career goals.⁷

The only thing standing between Jeremy Bloom and a multifaceted success story are the National Collegiate Athletic Association's [hereinafter "NCAA"] amateurism rules. NCAA rules provide that a student forfeits eligibility

by violating any regulations related to amateurism in Article 12 of the NCAA Division I Manual.⁸ The NCAA's Athletics Reputation Rule prohibits forms of compensation to student-athletes resulting from: "publicity, reputation, fame, or personal following that he or she has obtained because of athletics ability."⁹ In Bloom's case, the NCAA demonstrated its unwillingness to distinguish between the legitimate income of a professional athlete and the amateur status of a student-athlete. The NCAA's interpretation of "athletics ability" as it relates to pre-enrollment promotional activities and compensation in general, reveals the NCAA's inability to respond to a unique situation.

In essence, the NCAA has determined that, in order to remain eligible for football at CU, Bloom must forfeit the endorsements and modeling contracts he acquired as a professional skier, and, in doing so, jeopardize a potentially illustrious professional skiing and acting career. Bloom's case highlights the injustice and hypocrisy of the NCAA's amateurism rules and enforcement mechanisms. While the NCAA increasingly allows the exploitation of student-athletes, it haphazardly asserts amateurism rules to preclude legitimate professional opportunities for student-athletes.

This Note argues that the NCAA's interpretation of the amateurism provisions of the NCAA Division I Manual, with respect to Jeremy Bloom, is unreasonable, particularly in light of the NCAA's treatment of other dual-sport professional athletes. Consequently, the NCAA should create

an exception to its amateurism provisions allowing Bloom and similarly-situated student-athletes to earn income from sources unrelated to the amateur sport in which they compete. Furthermore, since the NCAA Bylaws constitute a contract to which student-athletes are third-party beneficiaries, courts should provide a forum to ensure the consistent and equitable application of the provisions of that contract. Part I explains the NCAA's role in regulating student-athletes and the regulations that are applicable to Jeremy Bloom's case. A discussion about the NCAA's inability in this case to forge a solution that is consistent with its principles and rules will also be covered in this part. Part II describes the legal battle between Jeremy Bloom and the NCAA as an example of the court's historical deference to the NCAA in enforcing its amateurism rules. This part also considers the merits of an antitrust claim under these circumstances and provides an analysis of Bloom's contract claim against the NCAA. Part III assesses the NCAA's application of its rules to Bloom and suggests how the NCAA and the courts should approach future cases involving similarly-situated student-athletes. Part IV concludes that the NCAA's reluctance to provide a waiver to Jeremy Bloom is inconsistent with both its rules and its policies. Whether or not a court provides a remedy, the NCAA should revisit its position to better manage future cases.

I. Background: The NCAA, Amateurism, and Jeremy Bloom

A. The National Collegiate Athletic Association and Applicable Regulations

The NCAA is an unincorporated voluntary association with approximately 1,200 members, consisting of colleges, universities, and other educational institutions, with more than 360,000 student-athletes.¹⁰ The members have adopted a constitution and bylaws specifying the agreements among members and rules under which they agree to operate.¹¹ The NCAA, initially created in 1906, regulates intercollegiate athletics to promote amateurism, academic integrity, and fair competition.¹² At its founding, the NCAA's stated purpose was as follows:

Its object shall be the regulation and supervision of college athletics throughout the United States, in order that the athletic activities ... may be maintained on an ethical plane in keeping with the dignity and high purpose of education.¹³

Originally, NCAA member institutions agreed to self-policing, a concept known as "home rule".¹⁴ It was not until 1940 that the membership authorized the NCAA Executive Committee to investigate alleged violations of the NCAA's amateurism

regulations and to issue interpretations of the NCAA's constitution.¹⁵

Today, the NCAA is a commercial enterprise that looks to maximize profits beyond a competitive rate.¹⁶ Several scholars have argued that the NCAA maximizes profits by upholding an outdated principle of amateurism, which prevents student-athletes from profiting from their athletic abilities.¹⁷ NCAA regulations governing the conduct of intercollegiate athletic programs must be adopted by the membership.¹⁸ Member institutions are obligated to apply and enforce NCAA legislation, and the enforcement procedures of the NCAA are applied to an institution when it fails to fulfill this obligation.¹⁹ Furthermore, courts have recognized the NCAA as serving these important functions.²⁰

The NCAA posits as the philosophy underlying its regulations in *The Principle of Amateurism*, which reads as follows:

"Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation and student-athletes should be protected from exploitation by professional and commercial enterprises."²¹

The NCAA has several regulations that purport to further this philosophy in intercollegiate athletics. First, NCAA Bylaw 14.01.3.1 provides that a student-athlete forfeits eligibility for participation in an intercollegiate sport by accepting payment in any form for participation in that sport or by violating any other regulations related to amateurism in Article 12.²² This eligibility rule is reiterated in Bylaw 12.1.1(a) which provides that an individual loses amateur status and shall not be eligible for intercollegiate competition if the individual "uses his or her athletic skill (directly or indirectly) for pay in any form in that sport."²³ Bylaw 12.1.1(a) is narrowly constructed such that an individual must receive payment for participation in the sport in which he competes as a student-athlete in order to forfeit eligibility. Therefore, Bloom cannot violate Bylaw 12.1.1(a) by earning income as a professional skier because he would not be earning income from the intercollegiate sport in which he competes: football.

In fact, as early as 1974, a professional athlete in one sport has been permitted to represent a member institution in a different sport.²⁴ A student-athlete is permitted to earn a salary as a professional with the caveat that a student-athlete may not receive institutional financial assistance so long as he is receiving remuneration from a professional sports organization.²⁵ This regulation permits two-sport athletes to collect salaries as professionals in a different sport without forfeiting their amateur status. Most notably, this provision enabled Drew Henson to cash in on a \$2 million signing bonus to play for the New York Yankees while playing football at the

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University of Michigan and Chris Weinke to accept a \$400,000 signing bonus with the Toronto Blue Jays before winning the Heisman trophy as the quarterback at Florida State University.²⁶

Although Bloom hoped to earn an income as a skier in accordance with NCAA regulations, he would lose his amateur status due to his planned endorsement income. The NCAA amateurism regulations limit the type and amount of compensation available to student-athletes. Compensation may be paid to a student-athlete only for work actually performed and at the going rate in that locality for similar services.²⁷ Moreover, Bylaw 12.4.1.1, the Athletics Reputation Rule, provides that compensation may not include any remuneration for value or utility that a student-athlete may have for an employer because of the publicity, reputation, fame or personal following that a student-athlete has obtained from athletics ability.²⁸ Unlike the NCAA's Principle of Amateurism and eligibility rules, the amateurism rules are not narrowly drawn by the qualifying language of "in that sport". In turn, the rules regarding amateurism grant the NCAA broader discretion to limit compensation to student-athletes that is not directly linked to their status as a student-athlete. The NCAA expressly prohibits compensation for post-enrollment promotional activities, including advertisements, modeling, and

is being resolved. On the other hand, the potential for such severe sanctions under Bylaw 19.8 discourages institutions from adhering to injunctions against the NCAA, and, as Bloom's case has revealed, may discourage courts from issuing injunctions against an institution at all.³³

Finally, under Bylaw 14.02.12, the NCAA may provide a waiver exempting an individual from the application of a specific regulation.³⁴ A waiver requires formal approval by the NCAA's Management Council, an NCAA committee or an NCAA conference. Such a waiver enables the NCAA to apply its regulations on a case-by-case basis. The waiver provides the NCAA with a mechanism to enforce its regulations equitably and in a manner that is consistent with the principles upon which the NCAA regulations are grounded.

B. The NCAA's Amateurism Deregulation Reform

Beginning in 1997, an NCAA Subcommittee on Agents and Amateurism began to identify problems with the organization's emphasis on amateurism in order to develop deregulation proposals that embodied a common sense approach to amateurism.³⁵ The subcommittee was interested

in taking a realistic approach to pre-enrollment activities and focusing on what it called the true concern of amateurism, competitive inequity.³⁶ The subcommittee recognized that certain NCAA eligibility rules were penalizing prospective student-athletes for actions that gave them no competitive advantage in intercollegiate sports.³⁷

UNLIKE the NCAA's Principle of Amateurism and eligibility rules, the amateurism rules are not narrowly drawn by the qualifying language of "in that sport."

endorsements.²⁹ Furthermore, although Article 12 grants an exception for pre-enrollment promotional activities, the requirements, which incorporate the "athletics ability" language of the Athletics Reputation rule and omit the qualifying "in an intercollegiate sport" language, are so limiting as to render the exception meaningless.³⁰

In addition to the self-enforcement mechanism imposed on NCAA member institutions, the enforcement procedures of the NCAA include the Restitution Rule of Bylaw 19.8.³¹ The Restitution Rule provides a list of sanctions that the NCAA may impose against a member institution whose student-athlete participates in competition under the terms of an injunction, which is later vacated, stayed, or reversed.³² In light of the duration of litigating disputes with the NCAA and the brevity of a collegiate career, a student-athlete's only effective legal remedy is an injunction against the NCAA and/or a member institution, allowing a student-athlete to take a desired course of action while the dispute

The NCAA deregulation proposals derived from frequent questions voiced by scholars, administrators, and student-athletes. Those questions included the following:

"Are there differences between Olympians who accept their prize money and those who do not? Will people increasingly take advantages of opportunities outside the college arena? Should NCAA amateurism rules extend to individuals who are not part of the NCAA? If the NCAA decides not to make changes should it take a different approach to enforcing NCAA rules?"³⁸

The NCAA subcommittee's proposals and the reforms that developed out of those proposals involved a major response to the realities of amateur competition. The pre-enrollment proposals included waivers to the ineligibility rules for certain pre-enrollment amateur and professional competition.³⁹ The proposals allowed individuals to enter professional drafts and sign professional contracts without forfeiting eligibility.⁴⁰ In essence, the reforms sought to

maximize the opportunities of the student-athlete to succeed particularly where no competitive advantage is at stake. Finally, although these proposals addressed shortcomings related to eligibility rules, the *Bloom* case brought to light similar shortcomings in the amateurism rules.

C. The NCAA's Stance on Bloom: An Inconsistent Application of its Regulations

In the early part of 2002 the NCAA denied Jeremy Bloom's request for a waiver under Bylaw 14.02.12, which allows the NCAA to formally approve an exception for an individual from the application of a specific regulation.⁴¹ Bloom's inability to acquire a waiver of the Athletics Reputation Rule prohibited him from accepting endorsements without forfeiting his eligibility to play football at the University of Colorado.⁴² Bloom's waiver application noted that mogul skiing is not a collegiate sport, that it is a different sport than that he planned to participate in at the University of Colorado, and that endorsements and sponsorships are the standard form of compensation for a professional skier.⁴³

Professional skiers earn a living and pay the cost of training for and participating in events through endorsements.⁴⁴ Before entering the college ranks Bloom received several endorsements which allowed him to compete on the World Cup circuit. It will cost him \$15,000 to \$20,000 to compete in up to seven moguls events during the 2003 professional skiing season.⁴⁵ The NCAA's amateurism rules, however, effectively prohibit compensation in the form of endorsements.⁴⁶ Without endorsement money, Bloom is unable to hire a coach and personal trainer like other competitors.⁴⁷

In light of the NCAA's recent reform efforts, the policy goals underlying the reforms and existing regulations, and its treatment of other two-sport professional athletes, the NCAA's denial of a waiver to Jeremy Bloom is difficult to explain. Bloom's case requires the NCAA to revisit the same questions that provoked it to pass amateurism deregulation legislation. Do Jeremy Bloom's endorsements, which are related to his professional skiing activity, render him unfit to play college football? Will the NCAA's stance discourage Bloom and similarly-situated athletes from going to college? Should the amateurism rules extend to a student-athlete's activities that are unrelated to the NCAA? In short, notwithstanding the fact that NCAA reforms support Bloom's position, the NCAA contradicted itself and those reforms by denying Bloom a waiver.

The NCAA amateurism rules pose the greatest impediment to Bloom's skiing career because they essentially prohibit student-athletes from receiving endorsements. The amateurism rules fundamentally conflict with Bylaw 12.1.2, which authorizes professional athletes to compete as student-

athletes in a different sport. The absolute ban on endorsements ignores the economic realities that face dual-sport athletes, such as professional skiers, who are compensated in the form of endorsements rather than salaries. Due to their heavy reliance on endorsements to maintain a competitive advantage, professional skiers are effectively precluded from becoming dual-sport student/professional-athletes. Finally, the amateurism rules are far more invasive than the eligibility rules. The amateurism rules prohibit compensation due to "athletics ability" in general, instead of activities related to a student-athlete's participation in a particular sport.

The NCAA must reconcile its denial of a waiver to Jeremy Bloom with its underlying goal of preventing competitive inequity in collegiate sports. First, through its past practice and existing regulations, the NCAA has established a precedent for allowing student-athletes to be compensated as professionals in sports outside of intercollegiate sports.⁴⁸ Secondly, the NCAA should not be allowed to discriminate against certain student-athletes who wish to maximize value as a student-athlete and a professional athlete in a different sport. Jeremy Bloom does not pose any greater threat to competitive inequity than the professional athlete who receives a salary. Consequently, where regulations such as the Athletics Reputation rule do not comport with other NCAA regulations and the principles espoused by the organization, the NCAA must develop a case-by-case approach to enforce its regulations consistently; otherwise, courts should enjoin the enforcement of those regulations.

II. The Legal Forum: Challenging the NCAA's Compensation Restrictions

A. The National Collegiate Athletic Association and Applicable Regulations

Courts have historically given the NCAA a high level of deference with respect to the enforcement of its eligibility and compensation regulations as a means of maintaining amateurism.⁴⁹ Challenges to NCAA regulations have typically come in the form of claims of restraint of trade and competition under the Sherman Antitrust Act.⁵⁰ In *NCAA v. Board of Regents*, the Supreme Court found that antitrust laws regulate the NCAA, and struck down a football marketing plan as an illegal anti-competitive agreement.⁵¹ The Board of Regents court found anti-competitive restrictions reasonable only if those restrictions further education and amateurism in intercollegiate college athletics.⁵² Several scholars have noted that the court's reasoning provided an opportunity to challenge the NCAA compensation restrictions.⁵³ The court

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also stated that the NCAA needs ample latitude to preserve education and amateurism in college athletics.⁵⁴ The court indicated that only the business activities of the NCAA are subject to antitrust scrutiny.⁵⁵ In dicta, the court said that, “it is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and, therefore, pro-competitive because they enhance the public interest in intercollegiate athletics.”⁵⁶ Furthermore, the *Board of Regents* court stated,

The NCAA seems to market a particular brand of football—college football. The identification of this product with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like.⁵⁷

Subsequent courts over the last several decades have rejected antitrust challenges to NCAA policies based on the court’s reasoning in *Board of Regents*.⁵⁸

Only one court has addressed the issue of whether the NCAA’s limited compensation regulations violate antitrust laws.⁵⁹ In *McCormack*, the United States Court of Appeals for the Fifth Circuit, citing dicta from *Board of Regents*, rejected a claim that the NCAA’s compensation restrictions constituted price fixing by the NCAA.⁶⁰ Although the plaintiffs argued that the NCAA permits some compensation through scholarships and allows student-athletes to compete as professionals in a different sport, the *McCormack* court found that the NCAA has the power to maintain a system containing some amateur requirements.⁶¹ The *McCormack* court has been highly criticized for relying on the language from *Board of Regents* instead of applying its own antitrust analysis.⁶²

Deference to the NCAA’s amateurism policy has become the norm for courts hearing challenges of NCAA regulations.⁶³ Although the philosophy of amateurism has continuously been used by courts to strike down antitrust challenges against the NCAA, collegiate sports involve an increased level of commercialism which undermines the validity of rulings based solely on amateurism.⁶⁴ Furthermore, such deference is unjustified in light of the fact that student-athletes, such as Bloom, may present meritorious challenges to NCAA regulations. Most importantly, the Supreme Court has not spoken on an antitrust challenge to NCAA compensation restrictions, and a successful challenge remains to be mounted.

B. Jeremy Bloom v. National Collegiate Athletic Association

Bloom responded to the NCAA’s waiver denial by instituting a claim in Boulder County, Colorado District Court seeking a temporary restraining order and a preliminary

injunction prohibiting the NCAA from declaring him ineligible.⁶⁵ Boulder County District Court Judge Daniel Hale denied Bloom’s request for injunctive relief on the grounds that he could not satisfy three of the six factors required for an injunction.⁶⁶ Citing *Rathke v. MacFarlane*,⁶⁷ the district court held that Bloom had demonstrated three of the six factors, including the following: the danger of real immediate and irreparable injury; that there was no plain, speedy and adequate remedy at law; and that the issuance of an injunction would preserve the status quo pending a trial on the merits.⁶⁸ Judge Hale expressed the opinion that Bloom is truly an amateur athlete in football, and that by failing to provide a waiver, the NCAA was missing an opportunity to support amateurism as well as the non-athletic growth of a student-athlete.⁶⁹ However, Bloom failed to demonstrate the following other three factors: a reasonable probability of success on the merits; that the balance of equities favored issuance; and that issuance of the injunction would serve the public interest.⁷⁰

Bloom’s attorneys, citing *Amoco Oil Co. v. Ervin*,⁷¹ argued a reasonable probability of success on the merits of a breach-of-contract claim on several grounds. First, that the NCAA breached its contract to provide student-athletes with the same educational opportunities available to other students and to permit Bloom to be a professional athlete in one sport while remaining an amateur in a second sport.⁷² Second, Bloom argued that because none of the opportunities he seeks to continue involve football, the NCAA’s regulation is arbitrary and capricious.⁷³ Third, Bloom argued that NCAA Bylaws contravene public policy because they prevent him from pursuing pre-existing employment opportunities.⁷⁴ Finally, Bloom argued that the NCAA restraints rendered the contract unconscionable.⁷⁵

The NCAA conceded that its constitution and bylaws constitute a contract between it and its member institutions.⁷⁶ Furthermore, the district court determined that student-athletes, including Jeremy Bloom, are third-party beneficiaries in the contract between the NCAA and member institutions because the NCAA and its member institutions intended to benefit the person not a party to the contract, and that benefit is direct and not merely incidental.⁷⁷ The district court found no breach because the NCAA was enforcing its bylaws as written and/or as it interprets the bylaws in order to foster amateurism.⁷⁸ Judge Hale refused to substitute his judgment for that of the NCAA.⁷⁹ The district court determined that Bloom should not be able to earn income in a form other than a salary under Bylaw 12.1.2, which permits student-athletes to earn a salary in a professional sport other than their collegiate sport, on the grounds that professional athletes receiving a salary might also try to retain endorsements.⁸⁰ Next, the district court determined there is a rational basis for restricting promotional appearances in Bylaw 12.5.1.3 because Bloom’s fame as both a professional skier and a college football player

might be involved in the endorsement deals.⁸¹ Finally, the court determined that the administrative process was not arbitrary and capricious.⁸²

Bloom argued that an issuance of an injunction would serve the public interest because it would allow Bloom to represent the United States of America in the Olympics, void restrictions on employment, maximize entertainment value for the public, enable Bloom to pay his way through college and prevent a breach of his contract with Tommy Hilfiger.⁸³ Judge Hale determined Bloom had not demonstrated that the issuance of an injunction would serve the public interest because the NCAA's ability to regulate student-athletes would be impaired and CU could potentially face sanctions under the Restitution Rule of Bylaw 19.8.⁸⁴ Finally, Judge Hale determined that Bloom had not satisfied the balance of the equities factor based on his findings with respect to the public interest factor.⁸⁵

Judge Hale's opinion is an example of the court's historical deference to the NCAA. The decision resembles *McCormack* insofar as it upholds an NCAA regulation without legitimately considering the merits of the legal challenge.⁸⁶ Moreover, the decision evidences deference to the NCAA above pure legal analysis that has also characterized previous decisions on challenges to NCAA compensation restrictions under the Sherman Antitrust Act. Rather than analyzing the rights of the parties under the contractual provisions of the NCAA Bylaws, Judge Hale found a rational basis for the NCAA's enforcement of the provisions as written or as interpreted by the NCAA.⁸⁷ Rather than perform his role, Judge Hale elected, "not to substitute [his] judgment for that of the NCAA and its members."⁸⁸ The case is currently pending in the Colorado State Court of Appeals, and it remains to be seen whether the court will legitimately consider the merits of Bloom's legal arguments.⁸⁹

C. The Merits of the Case: Bloom's Contract Claim and an Alternative Claim under the Sherman Antitrust Act

Bloom argues that the NCAA's application of its bylaws constitutes a breach-of-contract, and that the NCAA's enforcement should be refuted as arbitrary and capricious.⁹⁰ Bloom's claim embodies a narrow challenge to NCAA rules as they have been applied to him. The claim is quite different

than a facial challenge, such as a claim made on antitrust grounds. Bloom most likely adopted a contractual argument to minimize the effect of judicial deference to the NCAA,

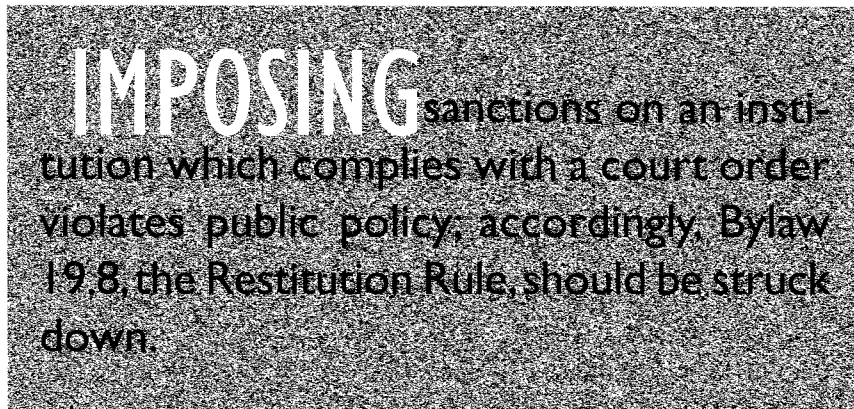
which has proven insurmountable to parties raising antitrust claims in the past. Nevertheless, Bloom was unable to establish a reasonable likelihood of success or a favorable balance of the equities due to the same type of deference to the NCAA. Although Bloom elected not to

raise an antitrust claim, a similarly-situated student-athlete may present a viable challenge to NCAA amateurism rules as an unreasonable restraint of trade under the Sherman Antitrust Act.⁹¹

(I) Misplaced Reliance on the Penalty Restitution Rule

The district court's denial of an injunction was due in large part to the Restitution Rule and the potential sanctions that CU could face were an injunction to be overturned.⁹² Imposing sanctions on an institution which complies with a court order violates public policy; accordingly, Bylaw 19.8, the Restitution Rule, should be struck down. Bylaw 19.8 is a risk allocation device which allows a member institution to weigh the benefits of allowing a student-athlete to compete under an injunction with the risks of potential sanctions that may be imposed if an injunction is overturned. Typically, unless a court orders a member institution to allow a student-athlete to compete, an institution makes the final determination of whether a student-athlete may compete. The *Lasege* court recognized that Bylaw 19.8 embodies an agreement between the member institutions as to how competitive equity should be restored in the event of an erroneous court determination regarding a student-athlete's eligibility.⁹³ In turn, the Restitution Rule is intended to contribute to a balance of the equities and serves the public interest by acknowledging a student-athlete's right to a judicial remedy and allowing member institutions to make a cost-benefit analysis.

Prior to handing down his ruling on Bloom's request for an injunction, Judge Hale ordered CU to take sides because of "internally conflicting interests."⁹⁴ Therefore, CU entered an appearance and aligned itself with the NCAA as an involuntary defendant.⁹⁵ As a result, the district court denied an injunction on the grounds that notwithstanding the probability of success on the merits, the possibility that an injunction would be overturned and the institution would face sanctions was sufficient to find that the public interest and



balance of the equities did not favor Bloom. Where a member institution is joined as a defendant and compelled to adhere to an injunction, the Restitution Rule exposes member institutions to the risk of sanctions for complying with a court order. Such a rule violates public policy because it punishes a party that complies with a court order. Furthermore, where a court denies a student-athlete an injunction due to the harsh consequences of the Restitution Rule it denies the right to a judicial remedy in violation of public policy. Accordingly, courts should enjoin the NCAA from imposing sanctions under such circumstances.

(2) Bloom's Breach-of-Contract Claim

Bloom claims that he has a contractual right to earn income as a professional skier.⁹⁶ This right derives from the combination of three provisions. The Principle of Amateurism provides that, "[s]tudent athletes shall be amateurs in an intercollegiate sport."⁹⁷ Bylaw 12.1.2 provides that, "[a] professional athlete in one sport may represent a member institution in a different sport."⁹⁸ Finally, Bloom claims that he has the right in his professional sport to use his "athletics skill (directly or indirectly) for pay in any form."⁹⁹ Bloom simply wants to maintain his amateur status as a collegiate football player while resuming his unrelated career as a professional skier.

Bloom also argues that the NCAA acted arbitrarily and capriciously in denying a waiver under Bylaw 14.02.12.¹⁰⁰ First, Bloom notes that the NCAA is not entitled to the deference normally afforded voluntary associations in dealing with its members because student-athletes are not members.¹⁰¹ Furthermore, in light of the substance of the rules and the procedures by which they are applied, the NCAA acted arbitrarily.¹⁰² The NCAA has the ability to handle his unique circumstances on a case-by-case approach. Denying a waiver requires the NCAA to ignore NCAA rules regarding professional athletes who receive salaries and current economic realities of professional skiers.

Furthermore, under *Amoco Oil Co. v. Ervin*,¹⁰³ Bloom could have argued that the NCAA breached an implied duty of good faith and fair dealing in failing to provide a waiver.¹⁰⁴ "The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of a contract."¹⁰⁵ This duty exists in every contract to enforce the reasonable expectations of the parties.¹⁰⁶ Additionally, "whether a party acted in good faith is a question of fact which must be determined on a case-by-case basis."¹⁰⁷

Bloom's argument that the NCAA breached an implied covenant of good faith is premised on the fact that the

DENYING a waiver requires the NCAA to ignore NCAA rules regarding professional athletes who receive salaries and current economic realities of professional skiers.

NCAA has discretionary authority over the enforcement of its regulations. The particular discretion in Bloom's case is the NCAA's ability to provide him with a waiver to retain endorsements as compensation in a different, professional sport.¹⁰⁸ To establish that the NCAA did not show good faith, Bloom must demonstrate he had a reasonable expectation that the NCAA would provide him with a waiver.¹⁰⁹

Bloom has a compelling argument that the NCAA has denied him his reasonable expectations. Bloom can point to existing NCAA regulations, which allow student-athletes to receive compensation as professionals in a different sport.¹¹⁰ Bloom may draw on examples of student-athletes whom the NCAA has allowed to compete as professionals in different sports under that rule, including Drew Henson and Chris Weinke.¹¹¹ If the NCAA insists that compensation to professional skiers through endorsements is significantly different than compensation to other professional athletes in the form of a salary, it should be refuted as a distinction that lacks substance and creates an inequitable result. By pointing to this flawed distinction, Bloom can undermine an attempt by the NCAA to justify its denial of a waiver for the sake of amateurism or competitive equity.

The NCAA would have to argue that endorsements are inherently contrary to amateurism and that allowing student-athletes, such as Bloom, to accept endorsements creates competitive inequity in intercollegiate sports. Bloom could first rebut that argument by presenting evidence that intercollegiate athletics is a business enterprise where commercial endorsements are commonplace. As several scholars have noted, the traditional amateur/education model of collegiate sports has given way to the commercial education model that currently exists.¹¹² Furthermore, Bloom and his attorneys have repeatedly pointed to the hypocrisy of the NCAA for allowing coaches and institutions to profit from endorsements from shoe and apparel companies.¹¹³

D. An Alternative Argument: Do the NCAA's Amateurism Rules Constitute an Unreasonable Restraint on Trade?

Although Bloom's attorneys may have elected not to mount an antitrust attack on NCAA amateurism rules due to

the court's historical deference to the NCAA regarding such claims, one must at least consider such an argument. Bloom's case would not embody a traditional challenge to NCAA regulations under the Sherman Antitrust Act.¹¹⁴ Such challenges have typically alleged that the NCAA is involved in price fixing or restraining competition amongst member institutions.¹¹⁵ Bloom's challenge would involve the argument that the NCAA is unreasonably restraining trade by prohibiting student-athletes, such as him, from receiving standard compensation as professional skiers. Although such a challenge is novel, framing the challenge in such a way, in light of recent NCAA reforms, might also provide a viable antitrust argument and undermine the NCAA's justification for the enforcement of amateurism rules.

(1) Applicability of the Sherman Antitrust Act

The basic requirement for application of the Sherman Act is that the activity in question involves or affects interstate commerce.¹¹⁶ Courts formerly provided a blanket exemption from antitrust scrutiny to nonprofit regulatory groups such as the NCAA.¹¹⁷ In recent years, however, courts have held that the NCAA is involved in commerce and its regulations, including those restricting compensation, involve or affect interstate commerce.¹¹⁸ In light of the Supreme Court's decision in *United States v. Lopez*,¹¹⁹ the NCAA could raise the argument that it is not involved in commerce and, therefore, its rules should not be subject to scrutiny under the Sherman Act.¹²⁰

In *Smith v. NCAA*,¹²¹ the court held that the Sherman Antitrust Act is only applicable to NCAA activities that are related to its commerce or business.¹²² Critics of *Smith v. NCAA* note several reasons why removing certain NCAA activities from antitrust scrutiny is inappropriate.¹²³ First, antitrust laws are only applicable to activities defined as commerce.¹²⁴ Second, the Supreme Court in *Board of Regents v. NCAA* accepted the fact that NCAA regulations involve commerce.¹²⁵ Finally, doing so fails to acknowledge pervasive commercialism in collegiate sports.¹²⁶ Each of these facts discourages a court from providing the NCAA with a blanket exemption from antitrust scrutiny. The commercial enterprise pervading the NCAA and its member institutions makes it disingenuous to say the NCAA is not involved in commerce. Even if a court were to follow *Smith*, the argument is undermined by the fact that the regulated activity (i.e., restrictions that limit the ability of certain two-sport athletes from competing as professionals) is related to commerce.

Although there is some dispute among lower courts as to whether a plaintiff must establish a nexus between the challenged restraint and interstate commerce or simply an effect on commerce resulting from the defendant's business activities in general, both tests could be satisfied under the facts in Bloom's case.¹²⁷ The NCAA compensation restrictions, analyzed in the context of non-salaried athletes

participating in different professional sports, satisfy both tests for involving or affecting interstate commerce. Just like intercollegiate athletics, professional sports competition, and skiing in particular, involves athletes from various states and countries. The economic interests at stake for student-athletes who are also professionals are corporate endorsements and sponsorship opportunities that are inextricably linked to interstate commerce.

The NCAA would likely argue that it does not prohibit student-athletes from competing in professional sports, only that it prohibits compensation in the form of endorsements and corporate sponsorships.¹²⁸ It would probably point to NCAA Bylaw 12.1.2 that expressly allows student-athletes to be compensated as professionals in a different sport.¹²⁹ However, the argument fails to acknowledge that endorsements and sponsorships are essential to participation in individual sports such as skiing.¹³⁰ Whereas salaried athletes' compensation includes the costs of training, travel, equipment, and the like, individual athletes such as Bloom rely on endorsements to cover such expenses.¹³¹ Thus, current NCAA regulations that deem endorsements an improper form of compensation prevent student-athletes, such as Bloom, from competing as professionals and, therefore, adversely affect interstate commerce.

(2) The Viability of the Claim under the Rule-of-Season Standard

A lawsuit challenging the NCAA compensation policies will be scrutinized under the rule-of-reason standard.¹³² Once it is demonstrated that the activity in question has a substantially adverse effect on commerce, the rule-of-reason test requires that the defendant demonstrate the pro-competitive virtue of the challenged behavior.¹³³ Finally, the rule-of-reason test requires that the plaintiff show that the challenged conduct is either not necessary to achieve the pro-competitive justifications put forth by the defendant or that those justifications can be achieved in a less restrictive manner.¹³⁴

By pointing to the endorsements and modeling contracts that the NCAA required him to forfeit in order to maintain his eligibility as a student-athlete, Bloom could demonstrate that the Athletics Reputation Rule has a substantially adverse effect on commerce. He can point to the fact that he and similarly-situated athletes are essentially precluded from earning a living as professional athletes without the ability to be compensated through endorsements. The NCAA will probably not argue its regulations do not have an adverse effect on commerce, but instead will rely on its argument about the pro-competitive nature of the regulations as a defense.

The NCAA has traditionally resorted to the justification that the compensation restrictions are necessary to protect amateurism and to protect college athletics.¹³⁵ The

NCAA has argued that payment of athletes blurs the distinction between college and professional sports, which would result in the loss of the uniqueness of their product.¹³⁶ The success of Bloom's claim may not lie in his ability to demonstrate that amateurism is no longer the primary concern of intercollegiate sports, but rather in his ability to demonstrate that the amateurism ideal is not implicated by his claim for an exception to the Athletics Reputation Rule. Bloom's unique challenge to NCAA compensation regulations, as an illegal restraint of competition as a professional in a different sport, combined with the NCAA's policy of permitting compensation for student-athletes participating as professionals in different sports, would further undermine such a justification. Although the NCAA might argue that endorsements and sponsorships are distinguishable from salaries and pose a threat to the competitive nature of collegiate athletics, it is an argument which truly lacks merit when applied to sports such as skiing.¹³⁷

In the end, it seems as though the merits of Jeremy Bloom's claim are substantial either in the form of a claim for breach of contract or as an illegal restraint of trade and competition. The success of such a claim depends on whether an argument can be formulated to undermine the court's historical deference to NCAA amateurism policies. The force

III. A Final Assessment of Bloom v. NCAA and Suggestions for Further Reform

A. The Appropriate Course of Action for the NCAA with Respect to Bloom and Similarly-Situated Student Athletes

Criticism of NCAA restrictions on compensation for student-athletes has reached a breaking point and if the NCAA does not implement further reform, changes may emerge through different avenues. In 2000, Ramogi Huma, a former UCLA linebacker, and fourteen of his former teammates formed the Collegiate Athletes Coalition (CAC) in an attempt to bring America's age old labor struggle to college sports.¹³⁸ Among the demands made by the CAC are increasing monthly stipends for players, eliminating the \$2000 cap on wages the student-athlete may earn, and giving players health insurance for off season workouts.¹³⁹ The CAC has encouraged activism for "players' rights" amongst student-

athletes seeking fair compensation and equal treatment.¹⁴⁰ CAC's message resounds in the case of Jeremy Bloom, and increased exposure of cases such as his is likely to foster support for the activist group.

Early in 2003, the Nebraska legislature considered a bill that would authorize the payment of a minimum wage stipend in addition to scholarship funds to Nebraska football players.¹⁴¹ Despite the

fact that any player who would receive payment under such a law would become ineligible to compete under NCAA rules, Nebraska legislators are trying to gather support amongst their Big 12 Conference counterparts.¹⁴² By passing similar legislation in each of the states that compose the conference, the advocates of deregulating student-athlete compensation hope to generate a strong voice which compels the NCAA to listen, and quite possibly, separate from the NCAA.¹⁴³

In the summer of 2003, California State Senator Kevin Murray introduced legislation to enhance student-athletes' rights and financial benefits.¹⁴⁴ The NCAA stated that if the legislation passes, California athletes might be declared ineligible to compete in NCAA events.¹⁴⁵ Murray sees it as an opportunity to convince the NCAA to address the concerns of student-athletes.¹⁴⁶ Bloom has become a political

fact that any player who would receive payment under such a law would become ineligible to compete under NCAA rules, Nebraska legislators are trying to gather support amongst their Big 12 Conference counterparts.¹⁴² By passing similar legislation in each of the states that compose the conference, the advocates of deregulating student-athlete compensation hope to generate a strong voice which compels the NCAA to listen, and quite possibly, separate from the NCAA.¹⁴³

fact that any player who would receive payment under such a law would become ineligible to compete under NCAA rules, Nebraska legislators are trying to gather support amongst their Big 12 Conference counterparts.¹⁴² By passing similar legislation in each of the states that compose the conference, the advocates of deregulating student-athlete compensation hope to generate a strong voice which compels the NCAA to listen, and quite possibly, separate from the NCAA.¹⁴³

CRITICISM of NCAA restrictions on compensation for student-athletes has reached a breaking point, and if the NCAA does not implement further reform, changes may emerge through different avenues.

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advocate by contributing to the drafting of a “Student-Athlete’s Bill of Rights” which proposes ways to enhance scholarships, including an allowance to secure employment not related to an amateur sport.¹⁴⁷

The reform sought by the aforementioned groups challenges the NCAA’s theory of limiting direct compensation to student-athletes. Several scholars have argued for a slightly less radical reform, suggesting that the NCAA should deregulate student-athletes’ indirect financial activities.¹⁴⁸ This author simply argues that the NCAA should treat all student-athletes equally under its existing regulations in order to maximize student welfare. In doing so, the NCAA must allow certain dual-sport professional/student-athletes

to receive compensation in the form of endorsements and corporate sponsorships. The NCAA must construe the Athletics Reputation Rule narrowly so as only to prohibit compensation that a student-athlete obtains because of “athletics ability” in the collegiate sport he or she actively participates. Such a construction is reasonable because it would not foster competitive inequity in any way. In other words, allowing Bloom to earn a living as a skier will provide CU with no advantage relative to its competitors. Each school would be able to recruit dual-sport athletes and each student-athlete could benefit from opportunities that are unrelated to their status as a collegiate athlete.

The NCAA could accomplish this goal either by providing a waiver or crafting a narrow exception to its amateurism rules. Such an allowance for dual-sport athletes does not generate competitive inequity. The NCAA does not have a legitimate concern that certain institutions will attract premier athletes on the basis of the ability of their student-athletes to acquire lucrative endorsement deals. Such a waiver would apply on a case-by-case basis and given the unique circumstances of Bloom, would be relatively uncommon. Professional athletes receiving direct monetary compensation would not be permitted to retain endorsements as alternative forms of compensation. Moreover, a student-athlete’s ability to obtain endorsements would be completely unrelated to his or her relationship with an institution.

The only impact such an exception might have on competitive equity would be with respect to the level of accommodation different member institutions provide to a dual-sport student-athletes. Moreover, it would not be anti-competitive in the sense that it disrupts an otherwise level playing field because each member institution would have the

ability to accommodate such athletes. Furthermore, the NCAA has implicitly condoned this type of competition under Bylaw 12.1.2. The NCAA may argue that allowing some student-athletes to accept endorsements while denying endorsements to others deviates from an otherwise bright-line rule. The NCAA could easily draw a bright line for the

THE NCAA could easily draw a bright line for the exception by permitting student-athletes to retain and renew existing endorsements while prohibiting an individual from obtaining new endorsements during his tenure as a student-athlete.

exception by permitting student-athletes to retain and renew existing endorsements while prohibiting an individual from obtaining new endorsements during his tenure as a student-athlete.

Bylaw 12.4.1.1 should be revised so as to resemble the language in Bylaw 12.1.1 which relates to eligibility limitations on pre-enrollment compensation.¹⁴⁹ Bylaw 12.1.1 provides that an individual loses amateur status and eligibility if he or she uses his or her athletics skill (directly or indirectly) for pay in any form in that sport.¹⁵⁰ The pre-enrollment compensation restriction is narrowly tailored so as to limit its application to participation in just the relevant sport. The NCAA and student-athletes would be better served by such an amendment to the amateurism rules.

Furthermore, the NCAA should revise Bylaw 12.1.2 “Amateur Status if Professional in Another Sport” so as to clarify the compensation allowance that accompanies it. The supplementary regulation should provide that compensation may be in the form of “salaries, prize money, and as otherwise provided under 14.02.12 on a case-by-case basis after formal approval by the NCAA Management Council or a NCAA committee or a NCAA conference.” Such a mechanism responds directly to the concerns expressed by Judge Hale that professional athletes receiving direct monetary compensation might attempt to retain endorsements as well. By not expressly allowing compensation in the form of endorsements the NCAA can retain control on the prevalence of corporate interests in the collegiate realm. Such a waiver provision would give the NCAA the ability to provide for unique situations such as that presented by Jeremy Bloom.

This approach would be consistent with the policies espoused in the NCAA’s recent amateurism deregulation

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effort and would assuage the common criticism of the NCAA. Bloom has not allowed restrictive NCAA amateurism rules to dissuade him from going to college, but he is part of a minority of individuals who elect to go to college when faced with that choice.¹⁵¹ This approach would also advance the welfare of student athletes to permit them to reap the benefits of personal and athletic accomplishments that are achieved before participating in collegiate athletics.

B. The Appropriate Course of Action for Courts with Respect to Bloom and Similarly-Situated Student-Athletes

The court in *Bloom v. National Collegiate Athletic Association* did not evaluate the merits of Jeremy Bloom's claim.¹⁵² The court essentially denied an injunction based on the NCAA's penalty Restitution Rule.¹⁵³ The decision resembles historical decisions involving challenges to NCAA regulations based on the fleeting concept of amateurism in collegiate athletics. Courts hearing claims of student-athletes which challenge NCAA regulations as detrimental to student welfare should characterize the relevant equities and public interest accordingly; that is, in terms of the student-athlete's right to a judicial remedy rather than for the protection of an institution. Otherwise, criticism of the court's unwillingness to apply true legal analysis due to deference to NCAA amateurism policies will transform into public outrage because student-athletes with viable claims are no longer entitled to their day in court.

With respect to dual-sport student-athletes with the ability to obtain endorsements derived solely to their professional endeavors, courts should impose an obligation on the NCAA to provide a waiver to the absolute prohibition of endorsements under the Athletics Reputation Rule. Such an obligation requires the NCAA to treat all dual-sport athletes equally, whether they are compensated in the form of a salary or with endorsements.

IV. Conclusion

Jeremy Bloom's legal battle demonstrates that the Athletics Reputation Rule, as applied to certain dual-sport athletes, is inconsistent with NCAA rules and policies. The NCAA's reluctance to provide a waiver cannot be justified by its effort to prevent competitive inequity. Jeremy Bloom does not pose any greater threat to competitive equity by retaining skiing endorsements and modeling contracts than do student-athletes who earn a salary as professional athletes. The inability of the court to consider the merits of Bloom's case reveals a lingering level of deference to the NCAA that impedes proper adjudication of viable challenges to NCAA regulations by student-athletes. If the NCAA continues to be

unwilling to accommodate unique student-athletes such as Jeremy Bloom, courts should not be thwarted by the NCAA's Restitution Rule to resolve valid claims regarding the true inequity of NCAA rules. If the NCAA continues to be inflexible in cases such as Bloom's and with respect to compensation in general, criticism will continue to mount and student-athletes will seek redress in courts, state legislatures and the realm of public opinion.

ENDNOTES

* J.D. Candidate, Vanderbilt University Law School, 2004; B.A. Boston College, 2001. Special thanks to Vice Chancellor David Williams, Michael Shanlever, my editors, parents and friends for their constant support and inspiration.

¹ *Bloom's Lawyers Appeal Denial of Injunction, Challenge NCAA Restitution Rule*, 3 No. 11 LEGAL ISSUES IN COLLEGIATE ATHLETICS 4 (2002). Jeremy Bloom placed ninth in the 2002 Winter Olympics. *Id.*

² See Appeal from the Denial of a Motion for Preliminary Injunction by the District Court for the County of Boulder, Division 2, at 3, *Bloom v. NCAA*, No. 02-CA-2302 (Colo. Ct. App. July 2, 2003) [hereinafter *Bloom's Brief*] (on file with the author).

³ Vicki Michaelis, *Colorado Punt Returner Back into the Skiing Grind*, USA TODAY, Dec. 5, 2002, at 10C. Bloom's agent, Andy Carrol, estimates that Bloom made about \$100,000 prior to enrolling at the University of Colorado. Most of that has been spent on legal fees challenging the NCAA rules that prohibit endorsements. *Id.*

⁴ Bloom's Brief, *supra* note 2, at 3. "The [Boulder County District Court] held that: '[a] professional skier ... is customarily compensated in monetary terms with prize money and earnings from promotions or endorsements.'" *Id.* "It found that prize money alone would not cover the cost of coaching and training, and that without the income from sponsor contracts, Jeremy 'will be unable to obtain and receive the customary income from professional skiing' and would lack sufficient funds to train and compete to defend 'his world cup title in freestyle mogul skiing.'" *Id.*

⁵ See Associated Press, *Bloom Will Continue to Play Football and Ski*, available at <http://espn.go.com/ncf/news/2003/0604/1563162.html> (June 4, 2003).

⁶ Bloom's Brief, *supra* note 2, at 4.

⁷ *Id.* "Stephen Jones, Ph.D., the Assistant Dean of the CU School of Journalism and Mass Communication, advised Jeremy to gain professional broadcasting experience: 'by being involved in the process of doing radio or television, a student learns a great deal.' He said that '[i]n addition to [its] academic

benefits,' the television experiences would give Jeremy 'an advantage when you graduate and start looking for a career.'" *Id.*

⁸ See National Collegiate Athletic Association, 2002-2003 NCAA Division I Manual art. 14.01.3.1 (2003) [hereinafter NCAA Division I Manual]. A student-athlete shall not be eligible for participation in an intercollegiate sport if the individual takes or has taken pay, or has accepted the promise of pay in any form, for participation in that sport, or if the individual has violated any of the other regulations related to amateurism set forth in Bylaw 12. *Id.*

⁹ *Id.* art. 12.4.1.1.

¹⁰ John Kitchin, 1996 Spring Symposium: Issues Facing College Athletics: The NCAA and Due Process, 5 KAN. J.L. & PUB. POL'Y 71, 71 (1996).

¹¹ *Id.*

¹² Laura Pentimone, *The National Athletic Association's Quest to Educate the Student Athlete: Are the Academic Eligibility Requirements an Attempt to Foster Academic Integrity or Merely to Promote Racism?*, 14 N.Y.L. SCH. J. HUM. RTS. 471, 478 (1998); see also Kay Hawes, "Its Object Shall Be Regulation and Supervision": NCAA Born From Need to Bridge Football and Higher Education, NCAA NEWS, Nov. 8, 1999, available at <http://www.ncaa.org/news/1999/19991108/active/3623n27.html> (last visited Oct. 11, 2003). The NCAA was initially entitled the Intercollegiate Athletic Association of the United States and was created to reform college football safety standards. *Id.*

¹³ See Hawes, *supra* note 12.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REF. 861, 865 (2002).

¹⁷ *Id.*; see also Hawes, *supra* note 13. It was a primary point in a 1995 book by former NCAA Executive Director Walter Byers, in which he charged that the Association had lost control of intercollegiate athletics to the detriment of the student-athletes who play the games. Byers claimed that institutions exerted control over athletes in the name of "amateurism" but that the control actually amounted to "economic tyranny."

¹⁸ Kitchin, *supra* note 10, at 71. While there is a 46-member council elected by the membership at the annual convention which directs the Association's matters between conventions,

committees appointed by the Council or established during the convention form the Association's core. The committees develop policy by channeling their reports and recommendations through the Council, steering committees or the Executive Committee to the annual convention. *Id.*

¹⁹ *Id.* at 72.

²⁰ Stephanie M. Greene, *Regulating the NCAA: Making the Calls under the Sherman Antitrust Act and Title IX*, 52 ME. L. REV. 81, 82 (2000).

²¹ NCAA Division I Manual, *supra* note 8, art. 2.9 (emphasis supplied).

²² NCAA Division I Manual, *supra* note 8, art. 14.01.3.1. "A student-athlete shall not be eligible for participation in an intercollegiate sport if the individual takes or has taken pay, or has accepted the promise of pay in any form, for participation in that sport, or if the individual has violated any of the other regulations related to amateurism set forth in Bylaw 12." *Id.*

²³ NCAA Division I Manual, *supra* note 8, art. 12.1.1(a) (2002) (emphasis supplied).

²⁴ *Id.* art. 12.1.2 (amateur status if professional in another sport).

Article 12.1.2 states:

A professional athlete in one sport may represent a member institution in a different sport. However, the student-athlete cannot receive institutional financial assistance in the second sport unless the student-athlete:

- (a) is no longer involved in professional athletics;
- (b) is not receiving any remuneration from a professional sports organization, and
- (c) has no active contractual relationship with any professional athletics team. However, an individual may remain bound by an option clause in a professional sports contract that requires assignment to a particular team if the student-athlete's professional career is resumed.

Id.; see also Hawes, *supra* note 12. Due to pressure from the economic reality of opportunities available to amateurs in professional competition, member institutions voted during the 1974 NCAA Convention to allow student-athletes to compete as a professional in one sport while keeping their eligibility in other sports. Hawes, *supra* note 12.

²⁵ NCAA Division I Manual, *supra* note 8, art. 12.1.2 (amateur

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status if professional in another sport).

²⁶ See George Diaz, *Pinhead of the Week*, ORLANDO SENTINEL, Aug. 23, 2002, at D2.

²⁷ NCAA Division I Manual, *supra* note 8, art. 12.4.1 (criteria governing compensation to student-athletes). Scholarship athletes receiving financial aid are entitled to receive compensation up to \$2000. *Id.*

²⁸ *Id.* art. 12.4.1 (criteria governing compensation to student-athletes).

²⁹ *Id.* art. 12.5.2.1 (advertisements and promotions subsequent to enrollment).

Article 12.5.2.1 states:

Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:

(a) accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or (b) receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

Id.

³⁰ *Id.* art. 12.5 (promotional activities); *Id.* art. 12.5.1.3 (continuation of modeling and other nonathletically related promotional activities after enrollment).

Article 12.5.1.3 states:

An individual may accept remuneration for the use of his name or picture to advertise or promote the sale or use of a commercial product so long as the activity was initiated prior to enrollment, the individual became involved in such activities for reasons independent of athletics ability, no reference is made to the individual's name or involvement in intercollegiate athletics, the individual does not endorse the product, any compensation received is consistent with applicable limitations on a student-athlete's maximum amount of financial aid, and the remuneration is at a rate commensurate with the individual's skills and experience as a model or performer and is not based in any way upon the individual's athletics ability or reputation.

Id.

³¹ *Id.* art. 19.7.

Article 19.7 lists the following nine potential sanctions that may be imposed on a member institution as means of restitution where an injunction is voluntarily vacated, stayed, or reversed, or it is finally determined by the courts that injunctive relief is not or was not justified:

(a) require that individual records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;

(b) require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;

(c) require that team victories achieved during participation by such student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;

(d) require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor of the competing institution supplying same;

(e) require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor of the competing institution supplying same;

(f) determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;

(g) determine that the institution is ineligible for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;

(h) require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Management Council concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and

(i) require that the institution that has been represented in an NCAA championship by such a student-athlete shall be assessed a financial penalty as determined by the Committee on Infractions.

Id.

³² *Id.*

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³³ See *Bloom's Lawyers*, *supra* note 1 (citing *Bloom v. NCAA*, No. 02-CV-1249 (Colo. Dist. Ct. Aug. 15, 2002)). The ruling was primarily based on the Restitution rule and the potential harm of sanctions that could be imposed on the University of Colorado as a result of an injunction being overturned.

³⁴ NCAA Division I Manual, *supra* note 8, art. 14.02.12 (waiver).

³⁵ National Collegiate Athletic Association, Division I Amateurism Deregulation Proposals, at 1, available at www.ncaa.org/library/membership/amateurism_deregulation/index.html (last visited Oct. 11, 2003) (NCAA President Cedric Dempsey stating that "under these proposals, we will be able to provide educational opportunities to student-athletes who indeed belong on our campuses, and we will be able to take the uncertainty out of our amateurism rules").

³⁶ *Id.* at 3.

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ NCAA Division I Manual, *supra* note 8, art. 12.2.4; National Collegiate Athletic Association, *supra* note 35, at 7-8.

⁴¹ NCAA Division I Manual, *supra* note 8, art. 14.02.12; see Luke Cyphers, *NCAA is Inflexible to Bloom*, DAILY NEWS, Feb. 19, 2002, at 55.

⁴² See NCAA Division I Manual, *supra* note 8, art. 12.4.1.1.

⁴³ See Cyphers, *supra* note 42, at 55.

⁴⁴ Adam Thompson, *Bloom Feeling in Bind; Athlete Can Split Time, but Financing Own Skiing 'Hard'*, DENVER POST, Dec. 23, 2002, at C1.

⁴⁵ *Id.*

⁴⁶ NCAA Division I Manual, *supra* note 8, art. 12.4.1.1 (athletics reputation).

⁴⁷ Vicki Michaelis, *Colorado Punt Returner Back into the Skiing Grind*, USA TODAY, Dec. 5, 2002, at 10C.

⁴⁸ NCAA Division I Manual, *supra* note 8, art. 12.1.2.

⁴⁹ See Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW J. 25, 41 (1996). "It does not appear likely that a court will find the limited compensation rules of the NCAA to be a violation of the

antitrust laws. Consequently, the NCAA must adopt some legislative enactment to provide just compensation to college athletes." *Id.*

⁵⁰ See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 85 (1984); *McCormack v. NCAA*, 845 F.2d 1338, 1338 (5th Cir. 1988); Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L. REV. 307, 318 (1998). "Passed in 1890, the Sherman Antitrust Act's main purposes are (1) to protect commerce against unlawful restraints and monopolies; and (2) to preserve freedom of competition. There are generally two elements to analyzing a Sherman Antitrust claim. First, it must be determined whether the Act applies to the challenged activity." Acain, *supra*, at 318. This basically requires that the activity "involve interstate commerce, making the activity reachable by Congress under its commerce powers. If the act applies, the second inquiry involves whether the challenged activity actually violates the Act." *Id.* The antitrust claim thus turns on whether the activity 'unreasonably' restrains trade.

⁵¹ See Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 37 (2000).

⁵² Bd. of Regents, 468 U.S. at 120; see also Pekron, *supra* note 51, at 37 (quoting the court in *NCAA v. Board of Regents* as saying "[w]hile as a guardian of an important American tradition, the NCAA's motives must be accorded a respective presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice").

⁵³ E.g., Pekron, *supra* note 51, at 38.

⁵⁴ 468 U.S. at 120.

⁵⁵ *Id.* at 117.

⁵⁶ *Id.*

⁵⁷ *Id.* at 101-02.

⁵⁸ Pekron, *supra* note 51, at 39.

⁵⁹ See *McCormack v. NCAA*, 845 F.2d 1338, 1338 (5th Cir. 1988).

⁶⁰ *Id.* at 1344.

⁶¹ *Id.* at 1345.

⁶² See Pekron, *supra* note 51, at 39.

⁶³ See Schott, *supra* note 49, at 41.

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⁶⁴ See *Acain*, *supra* note 50, at 310-13; see also Edelman, *supra* note 16, at 865. "Over the past two decades NCAA commercialization has grown rampant, as the once safety-oriented body has emerged as the headquarters of professional-like sports enterprise." Edelman, *supra*, at 867. "Recent NCAA commercialization is evident by the 2001-02 budget, which anticipates \$346 million revenue, of which \$271 million comes from television contracts, \$37 million from championship events, and \$27 million from licensing rights." *Id.*

⁶⁵ See *Bloom v. NCAA*, No. 02-CV-1249, slip op. at 2 (Colo. Dist. Ct. Aug. 15, 2002); see also B.G. Brooks, *Bloom Wants Ruling; Motion Seeks to Clear up Eligibility for CU Football*, ROCKY MOUNTAIN NEWS, July 26, 2002 at 1C.

⁶⁶ See *Bloom*, slip op. at 25; see also *Bloom's Lawyers*, *supra* note 1 (citing *Bloom v. NCAA*, No. 02-CV-1249 (Colo. Dist. Ct. Aug. 15, 2002)).

⁶⁷ *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

⁶⁸ See *Bloom*, slip op. at 8-10. First, Bloom established irreparable harm in that he risked losing an opportunity to defend his world cup title in freestyle moguls skiing and to earn an income from modeling, television and film opportunities. *Id.* Second, there was no speedy or adequate remedy at law because money damages are not available and would be impossible to ascertain. *Id.* Third, an injunction would preserve the status quo because it would allow Bloom to pursue his existing skiing career in exactly the same fashion as any other college student who did not fall within the purview of the NCAA rules. *Id.*

⁶⁹ *Id.* at 22.

⁷⁰ See *id.* at 10-25.

⁷¹ 908 P.2d 493, 498-99 (Colo. 1995).

⁷² See Jeremy Bloom's Verified Motion for Temporary Restraining Order and for Preliminary Injunction, *Bloom v. NCAA*, No. 02-CV-1249, at 7 (Colo. Dist. Ct. July 25, 2002) [hereinafter Bloom's Motion].

⁷³ *Id.* at 9; see also *NCAA v. Lasege*, 53 S.W.3d 77, 83 (Ky. 2001). Relief from our judicial system should be available if voluntary athletic associations act arbitrarily and capriciously towards student-athletes.

⁷⁴ Bloom's Motion, *supra* note 72, at 12.

⁷⁵ *Id.* at 13.

⁷⁶ See *Bloom v. NCAA*, No. 02-CV-1249, slip op. at 5 (Colo.

Dist. Ct. Aug. 15, 2002).

⁷⁷ *Id.* This series of bylaws is almost solely for the benefit of the student-athletes as it related to a primary purpose of the contract: the education of student-athletes.

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 15. Judge Hale also determined that the NCAA's advertising and promotional policy did not render its restrictions on Bloom unfair and capricious.

⁸⁰ *Id.*

⁸¹ *Id.* at 18. Judge Hale neglected to explain what risk that was raised by such a possibility.

⁸² *Id.* at 20.

⁸³ Bloom's Motion, *supra* note 72, at 13.

⁸⁴ *Bloom v. NCAA*, No. 02-CV-1249, slip op. at 23 (Colo. Dist. Ct. Aug. 15, 2002).

⁸⁵ *Id.* at 25.

⁸⁶ See *McCormack v. NCAA*, 845 F.2d 1338, 1338 (5th Cir. 1988).

⁸⁷ *Bloom*, slip op. at 11.

⁸⁸ *Id.* at 15.

⁸⁹ See Bloom's Brief, *supra* note 2, at 1; see also *Bloom's Lawyers Appeal Denial of Injunction, Challenge NCAA Restitution Rule*, 3 No. 11 LEGAL ISSUES IN COLLEGIATE ATHLETICS 4 (2002) (citing *Bloom v. NCAA*, No. 02-CV-1249 (Colo. Dist. Ct. Aug. 15, 2002)).

⁹⁰ See Bloom's Brief, *supra* note 2, at 25, 31.

⁹¹ 15 U.S.C. §§ 1-7 (2000).

⁹² See *Bloom*, slip op. at 23.

⁹³ See *NCAA v. Lasege*, 53 S.W.3d 77, 88 (Ky. 2001). In *Lasege*, the University of Louisville and the student-athlete sought an injunction. *Id.* at 80. Therefore, the court did not consider the public policy argument against imposing sanctions against a member institution as an involuntary defendant. *Id.* at 87.

⁹⁴ See Owen S. Good, *Bloom's Drive to Play Stays Alive; Boulder Jurist Nixes NCAA Attempt to Delay Injunction Bid*, ROCKY MOUNTAIN NEWS, Aug. 7, 2002, at 5C.

⁹⁵ See *Bloom*, slip op. at 2.

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⁹⁶ NCAA Division I Manual, *supra* note 8, art. 2.9; see Bloom's Brief, *supra* note 2, at 25.

⁹⁷ Bloom's Brief, *supra* note 2, at 25.

⁹⁸ NCAA Division I Manual, *supra* note 8, art. 12.1.2; see Bloom's Brief, *supra* note 2, at 26.

⁹⁹ NCAA Division I Manual, *supra* note 8, art. 12.1.1; see Bloom's Brief, *supra* note 2, at 26.

¹⁰⁰ See NCAA v. Lasege, 53 S.W.3d 77, 83 (Ky. 2001); see Bloom's Brief, *supra* note 2, at 31.

¹⁰¹ See Bloom's Brief, *supra* note 2, at 31-32 (citing Gulf States Conference v. Boyd, 369 So. 2d 553, 557 (Ala. 1979) for the proposition that where the athlete is not even a member of the athletic association, the basic 'freedom of association' principle behind the non-interference rule is not present. "The athlete himself has no voice or bargaining power concerning the rules and regulations adopted by the athletic associations because he is not a member, yet he stands to be substantially affected, and even damaged, by an associations ruling declaring him ineligible to participate in intercollegiate athletics." 369 So. 2d at 557.

¹⁰² Bloom's Brief, *supra* note 2, at 32.

¹⁰³ 908 P.2d 452, 498-99 (Colo. 1995).

¹⁰⁴ *Id.*; see Bloom's Lawyers Appeal Denial of Injunction, Challenge NCAA Restitution Rule, 3 No. 11 LEGAL ISSUES IN COLLEGIATE ATHLETICS 4 (2002) (citing Bloom v. NCAA, No. 02-CV-1249 (Colo. Dist. Ct. Aug. 15, 2002)).

¹⁰⁵ *Amoco Oil*, 908 P.2d at 498-99.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 499.

¹⁰⁸ NCAA Division I Manual, *supra* note 8, art. 14.02.12.

¹⁰⁹ See *Amoco Oil*, 908 P.2d at 498-99.

¹¹⁰ NCAA Division I Manual, *supra* note 8, art. 12.1.2.

¹¹¹ Diaz, *supra* note 26.

¹¹² See Acain, *supra* note 50, at 311-12.

¹¹³ See Bloom's Brief, *supra* note 2, at 26; see also Adam Thompson, *Bloom Must Return an Amateur; Skiing Endorsements Cripple Football Career*, DENVER POST, Feb., 17, 2002 at D-06.

¹¹⁴ 15 U.S.C. §§ 1-7 (2000).

¹¹⁵ *Id.*

¹¹⁶ See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 215 (1990) (citing McLain v. Real Estate Bd., 444 U.S. 232, 242 (1980)).

¹¹⁷ *Id.* at 215-16.

¹¹⁸ *Id.* (citing NCAA v. Board of Regents, 468 U.S. 85, 85 (1984)); Marjorie Webster Coll. v. Middle States Ass'n, 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970); Hennessey v. NCAA, 564 F.2d 1136, 1150 (5th Cir. 1977).

¹¹⁹ 514 U.S. 549 (1995).

¹²⁰ See Goldman, *supra* note 116, at 215. In *United States v. Lopez*, the Supreme Court limited federal power under the Commerce Clause by rejecting a federal statute that forbade possession of a gun in a school zone. The Court held that mere possession of a weapon in a school zone was not "commerce" because it had nothing to do with manufacturing or trade. 514 U.S. at 642.

¹²¹ 978 F. Supp. 213 (W.D. Pa. 1997).

¹²² See Acain, *supra* note 64, at 320-21.

¹²³ *Id.* at 321.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See *id.* at 322.

¹²⁷ See Goldman, *supra* note 116, at 215.

¹²⁸ See NCAA Division I Manual, *supra* note 8, art. 12.1.2; *Id.* art. 12.4.1.1.

¹²⁹ See NCAA Division I Manual, *supra* note 8 art. 12.1.2.

¹³⁰ See Jeff Shain, *NCAA Lacking Common Sense; Bloom a Victim of Bad Rule*, MIAMI HERALD, Aug. 29, 2002, at 9D.

¹³¹ *Id.*

¹³² See Pekron, *supra* note 51 at 34 (citing Law v. NCAA, 134 F.3d 1010, 1018-19 (10th Cir. 1998)).

¹³³ *Id.* at 33.

¹³⁴ *Id.* (citing Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997)).

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¹³⁵ See *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988); Pekron, *supra* note 51, at 34.

¹³⁶ See Pekron, *supra* note 51, at 33 (citing Board of Regents, 468 U.S. at 101-02).

¹³⁷ See *infra* Part III.B.

¹³⁸ Bill Briggs, *New Teamsters Led by a Former UCLA Linebacker, Efforts to Organize College Athletes as a Labor Force are on the Rise*, DENVER POST, Dec. 5, 2002 at D1. The Collegiate Athlete's Committee (CAC) has received support from the 700,000 member union United Steelworkers which has sent representatives to CAC rallies and offers advice regarding labor unrest. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* The CAC has signed up about 1,000 members and opened chapters on fifteen campuses. Critics claim that CAC will be short-lived due to its West Coast focus and the short-term membership of collegiate athletes.

¹⁴¹ Adam Thompson, *Cash Crop Nebraska Legislator's Plan to Pay Cornhuskers Engenders Sympathy, Skepticism in Big 12*, DENVER POST, Feb. 27, 2003 at D1.

¹⁴² *Id.*

¹⁴³ *Id.* Several legislators from neighboring states have voiced criticism of such legislation on the grounds that it implicates Title IX and because it is economically impractical for most Division I athletic programs that do not generate a profit.

¹⁴⁴ Vicki Michaelis and David Leon Moore, *Bloom Proposal Similar to Controversial California Bill*, USA TODAY, July 14, 2003, at 10C.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Edelman, *supra* note 16, at 865.

¹⁴⁹ NCAA Division I Manual, *supra* note 8, art. 12.1.1.

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ See Shain, *supra* note 131. Bloom commented about a girl on his ski team that was offered a scholarship to play softball, but when the NCAA denied her request she decided not to go to college. *Id.*

¹⁵² See *Bloom's Lawyers Appeal Denial of Injunction, Challenge NCAA Restitution Rule*, 3 No. 11 LEGAL ISSUES IN COLLEGIATE ATHLETICS 4 (2002) (citing *Bloom v. NCAA*, No. 02-CV-1249 (Colo. Dist. Ct. Aug. 15, 2002)).

¹⁵³ *Id.*

¹⁵⁴ See Schott, *supra* note 49, at 41.

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